

No. 13940

United States
Court of Appeals
for the Ninth Circuit

JAMES ROLLAND FRANCY,

Appellant.

vs.

UNITED STATES OF AMERICA.

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

APR 18 1932

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

J. B. TIETZ,
257 S. Spring St.,
Los Angeles 12, Calif.

For Appellee:

WALTER S. BINNS,
United States Attorney;

MARK P. ROBINSON,

MANUEL REAL,

Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.



In the United States District Court in and for the
Southern District of California, Central Division

No. 22,571-CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES ROLLAND FRANCY,

Defendant.

INDICTMENT

[U.S.C., Title 50, App., Sec. 462—Universal
Military Training and Service Act.]

The grand jury charges:

Defendant James Rolland Francy, a male person within the class made subject to selective service under the Universal Military Training and Service Act, registered as required by said act and the regulations promulgated thereunder and thereafter became a registrant of Local Board No. 85, said board being then and there duly created and acting, under the Selective Service System established by said act, in Los Angeles County, California, in the Central Division of the Southern District of California; pursuant to said act and the regulations promulgated thereunder, the defendant was classified in Class I-A-O and was notified of said classification and a notice and order by said board was duly given to him to report for induction into the armed forces of the United States of America on July 10, 1952, in Los Angeles County, California,

in the division and district aforesaid; and at said time and place the defendant did knowingly fail and neglect to perform a duty required of him under said act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do.

A True Bill.

/s/ LAWRENCE L. ROGERS,
Foreman.

/s/ WALTER S. BINNS,
United States Attorney.

ADM:AH

[Endorsed]: Filed November 19, 1952. [2*]

United States District Court for the Southern
District of California, Central Division
No. 22,571-Cr.

UNITED STATES OF AMERICA,

vs.

JAMES ROLLAND FRANCY

Indictment [1 Count—for Violation of
50 U.S.C. § 462.]

JUDGMENT AND COMMITMENT

On this 7th day of April, 1953, came the attorney for the government, and the defendant appeared

*Page numbering appearing at foot of page of original Certified Transcript of Record.

in person and with his attorney, J. B. Tietz, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a finding of guilty of the offense of having on July 10, 1952, in Los Angeles County, California, knowingly failed and neglected to perform a duty required of him under the Universal Military Training and Service Act and the regulations promulgated thereunder in that he then and there knowingly failed and neglected to report for induction into the armed forces of the United States as so notified and ordered to do, as charged in the Indictment; and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four years in an institution to be selected by the Attorney General of the United States or his authorized representative for the offense charged in the indictment.

It Is Adjudged that execution be stayed until 4 p.m. on Thursday, April 9, 1953, and that the bail of the defendant be exonerated upon surrender of the defendant to the United States Marshal at or prior to 4 p.m. on April 9, 1953.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the

United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ WM. C. MATHES,
United States District Judge.

EDMUND L. SMITH,
Clerk,

By /s/ P. D. HOOSER,
Deputy Clerk.

[Endorsed]: Filed April 7, 1953. [7]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Appellant, James Rolland Francy, resides at 10538 Samoa Avenue, Tujunga, California.

Appellant's attorney, J. B. Tietz, maintains his office at 534 Douglas Building, 257 South Spring Street, Los Angeles 12, California.

The offense was failing to submit to induction, U.S.C. Title 50, App., Sec. 462—Selective Service Act, 1948.

On April 7, 1953, after a verdict of Guilty, the Court sentenced the appellant to four years' confinement in an institution to be selected by the Attorney General.

I, J. B. Tietz, appellant's attorney, being authorized by him to perfect an appeal, do hereby appeal

to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

/s/ J. B. TIETZ,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 7, 1953. [8]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

The following are hereby designated as the record which is material to the proper consideration of the Appeal filed by James Rolland Francy in the above-entitled cause:

1. Indictment.
2. Reporter's Transcript (as requested of Reporter).
3. All Exhibits in evidence or proffered are to be transmitted to the Court of Appeals as provided by Rule 75 (O), R.C.P., and Rule 11 of the U.S.C.A. for the Ninth Circuit.
4. Notice of Appeal.
5. Designation of Record.
6. All Stipulations.

/s/ J. B. TIETZ,
Attorney for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 29, 1953. [10]

In the United States District Court, Southern
District of California, Central Division

No. 22,571—Crim.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES ROLLAND FRANCY,

Defendant.

Honorable William C. Mathes, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

WALTER S. BINNS,

United States Attorney, by

MANUEL REAL,

Asst. United States Attorney.

For the Defendant:

J. B. TIETZ, ESQ.

Wednesday, March 18, 1953—2:00 P.M.

(Case called by the clerk.)

Mr. Real: Ready for the Government, your
Honor.

Mr. Tietz: Ready for the defendant.

Mr. Real: The defendant is present in court.

The Court: Is that the case you wish to try first, Mr. Tietz?

Mr. Tietz: Yes, sir.

The Court: Very well, we will mark it "ready" and continue the call of the calendar.

(Interruption for other court proceedings.)

The Court: May I see the file in the Francy case? It appears from the file in No. 22571—first, is it stipulated in this case that the defendant is present, gentlemen?

Mr. Real: So stipulated, your Honor.

Mr. Tietz: So stipulated.

The Court: It appears from the file that there has been a waiver of trial by jury and a waiver of special findings of fact approved and filed on January 5, 1953. Does the defendant still wish to proceed without a jury?

Mr. Tietz: Yes, your Honor.

The Court: Very well, you may proceed.

Mr. Real: Your Honor, the Government will waive its opening statement at this time. [3*]

The Government calls as its first witness Mrs. Mary B. Lewis.

MRS. MARY B. LEWIS

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Mrs. Mary B. Lewis.

The Clerk: L-e-w-i-s?

The Witness: Right.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Mrs. Mary B. Lewis.)

Direct Examination

By Mr. Real:

Q. Mrs. Lewis, what is your occupation?

A. I am clerk of the Burbank group, in charge of the Burbank group.

Q. Do you recognize the defendant here on trial, James Rolland Francy? A. Yes, I do.

Q. Is he a registrant of your Local Board?

A. He is a Local Board registrant of 85.

Q. You brought with you certain records today, is that correct? A. Yes.

Mr. Real: May I have them, please? We ask that the Selective Service file of James Rolland Francy be marked as Government's 1 for identification, your Honor. [4]

The Court: Is that a file which the witness has just presented?

Mr. Real: Yes, it is.

The Court: Is that the Selective Service file of the defendant?

The Witness: It is.

The Court: It will be marked Government's Exhibit 1 for identification.

May it be stipulated it is the file?

Mr. Tietz: This case is a little unique in that respect, your Honor.

The Court: Very well.

Q. (By Mr. Real): I place before you, Mrs. Lewis, Government's Exhibit 1 for identification and ask you if you have seen that file before?

(Testimony of Mrs. Mary B. Lewis.)

A. Yes.

Q. And what is that file?

A. That is the Selective Service file of James Rolland Francy.

Q. And, as clerk of Local Board 85 are you legal custodian of that file? A. Yes.

Q. Is that file kept in the normal course of Local Board No. 85's business? Is it the normal course of Local Board No. 85's business to keep that record? [5] A. Yes.

Mr. Real: Your Honor, at this time we move that Government's Exhibit 1 for identification be introduced into evidence.

The Court: Is there objection?

Mr. Tietz: The defendant objects. It has not been established that this witness is the one that had control of that file so that she, of her own knowledge, can be certain that it is in all respects a true and correct file of this registrant.

The Witness: It is the file that has been kept for that registrant. We do have some out—an out-file that has some letters that presumably that have come in after the file was photostated, and that is all I have besides the file that you have.

Mr. Tietz: Possibly your Honor could rule on the objection subject to cross-examination, and then take up the matter as to whether this file should be introduced. Maybe it will bring out in several respects it is not correct.

Mr. Real: May the Government be heard, your Honor?

(Testimony of Mrs. Mary B. Lewis.)

The Court: From the face of it, it is admissible on the witness' foundational testimony.

Mr. Real: That is correct, your Honor. The witness has said she is the legal custodian, and that is all that is necessary under the rules of evidence.

The Court: Do you wish to cross-examine this witness? [6]

Mr. Tietz: Oh, yes.

The Court: The objection is overruled and Exhibit 1 for identification is received into evidence. Had you completed your direct examination?

Mr. Real: Yes, I have, your Honor. You may cross-examine.

The Court: You may cross-examine, Mr. Tietz.

The Clerk: Government's Exhibit 1 admitted into evidence.

Cross-Examination

By Mr. Tietz:

Q. Does Government's Exhibit 1 contain in it a letter from Col. Hartwell of the Selective Service System throwing doubt on whether or not the registrant had been classified in accordance with the regulations, particularly in that he had not been reclassified after the personal appearance of February the 8th, 1951?

Mr. Real: Your Honor, I am going to object to that question on the ground that it is incompetent and that it calls for the conclusion of this witness; and further, that the file is the best evidence of whether that letter is there or not.

(Testimony of Mrs. Mary B. Lewis.)

The Court: Isn't the objection good on the last ground?

Mr. Tietz: The last ground is a very good one, but it will help us if the witness can tell us if there is that or an equivalent expression in there from Col. Hartwell. [7]

The Court: I will overrule the objection. You may answer it, if you can.

The Witness: Well, I haven't got the file here. If you want me to look through it——

The Court: Mr. Clerk, will you please place Exhibit 1 before the witness?

The Clerk: Yes, your Honor.

A. No, there is no such letter in this file.

Q. (By Mr. Tietz): In Exhibit 1; that is what you are referring to?

A. The registrant's Selective Service file.

Q. Isn't it a fact that the Local Board No. 85 received such a letter from Col. Hartwell expressing such a sentiment?

A. Well, I can look through the out file. I wouldn't know. I haven't looked through the out file.

Q. Will you do that, please?

A. That was of the date it was photostated, and then I have the out file.

Q. You mean that all the papers in this registrant's file were not sent for photostating?

A. Well, not if they were received afterwards.

Q. Aren't there some papers in Exhibit 1 that

(Testimony of Mrs. Mary B. Lewis.)

were received afterwards, whatever "afterwards" means?

A. What is the date of the photostating certification? The date it was sent I will have to look.

The Court: In other words, Exhibit 1 is not the complete file up to date, is that correct?

The Witness: After it was photostated, anything that came in after the file was photostated we did not place in the file because that was supposed to be a photostatic copy.

The Court: Can you give us that date?

Q. (By Mr. Tietz): I will place before you a black and white photostat. Could you tell us the date of the photostating?

A. I can't tell you the date of the photostating. I can tell you probably the date it was sent for photostating.

The Court: The question is: Do you have some material that constitutes, properly, a part of the Selective Service file of this defendant which is not in Exhibit 1? Do you understand my question?

The Witness: It was sent to Sacramento on November 3, 1952 for photostating.

The Court: Do you have any material in your possession which properly belongs to the Selective Service file of this defendant which is not now in Exhibit 1, the folder before you?

The Witness: This is the folder.

The Court: You have not answered my question.

The Witness: This is it. This is all I have.

The Court: You do have some, is that correct?

(Testimony of Mrs. Mary B. Lewis.)

The Witness: Yes. [9]

The Court: Very well. It should be in that file, should it not? It should be placed in Exhibit 1?

The Witness: Yes.

The Court: In other words, what we are after is the complete Selective Service file of this defendant. I understood Exhibit 1 is offered as a complete Selective Service file, is it not, Mr. Real?

Mr. Real: It is offered as the Selective Service file of James Rolland Francy. Now, I don't know what——

The Court: The witness states she has some other material which has come in since November that properly should be in Exhibit 1. Is there any objection to her now placing these in Exhibit 1?

Mr. Real: No objection from the Government, your Honor.

The Court: Is there any objection on the part of the defendant?

Mr. Tietz: None.

The Court: Will you place that, Mrs. Lewis, and incorporate it into Exhibit 1, whatever belongs there, so the Selective Service file of the defendant will be complete up to date?

The Witness: That is it, yes.

The Court: Now, have you done so? Your answer?

The Witness: Yes, sir.

The Court: The reporter cannot get it if you just shake your head. [10]

The Witness: Yes, that is right.

(Testimony of Mrs. Mary B. Lewis.)

The Court: Any further questions of this witness?

Mr. Tietz: Yes, sir.

Q. Mrs. Lewis, I am going to show you a card labeled Registration Certificate and I have just shown it to Mr. Real. Will you please examine it? Can you tell us what that is?

A. It is his registration card, Form 2.

Q. That was given to Mr. Francy when or at what occasion?

A. It was given to him May 8 of '50 on the occasion of his registration for Selective Service.

Q. That shows he is a registrant of what board?

A. Well, it doesn't show what board he is a registrant of, except that his place of residence on line 2 places him within the jurisdiction of Local Board——

Q. That is not the question I asked you right now, Mrs. Lewis. Doesn't it show what board he is a registrant of? A. No.

Q. What does it say there about board?

A. Well, it says the registrar for Local Board 87 registered him.

Q. Now, what does that mean?

A. It means that the registrar who registered him was a registrar for Local Board 87. [11]

Q. Will you explain to us how he was processed by Local Board No. 85?

A. Well, his home address as given on line 2 for the registration card was within the jurisdiction of Local Board No. 85, therefore, the card,

(Testimony of Mrs. Mary B. Lewis.)

original Form 1 of the registration, was put into 85.

Q. Now, would you please look at page 26 of Exhibit 1? A. Yes.

Q. That purports to be——

The Court: What you have handed the clerk, Mr. Tietz, is a photostatic copy of the Selective Service file, Exhibit 1?

Mr. Tietz: It is a photostatic copy of what has been placed in as Exhibit 1, with the exception of the so-called out file.

The Court: Now, that has been included, has it not, Mrs. Lewis?

The Witness: Yes.

The Court: By you while on the stand the so-called out file has been incorporated into Exhibit 1 and has become a part of the Selective Service file.

Mr. Tietz: Yes, sir. I thought the court might——

The Court: So this photostatic copy, I take it, is complete up to a date in November when the witness testified the file was sent out for photostating. Is that correct? [12]

The Witness: That is correct.

Mr. Tietz: Complete in the sense that it is a photo-copy of Exhibit 1 up to that point?

The Court: Yes. Is that agreed, Mr. Real?

Mr. Real: That is agreed, your Honor.

The Court: Very well.

Q. (By Mr. Tietz): Will you look, Mrs. Lewis, at page 26 and tell us what that page is?

A. It is a record of personal appearance of the

(Testimony of Mrs. Mary B. Lewis.)

registrant when he appeared before the board, No. 85.

Q. Who made that?

A. It was made by the clerk of the board. As a rule they make them. I don't know that she made it, but she was a clerk of the board. The clerk of the board has charge of making these records.

Q. Then you do not know who made it?

A. It was the clerk of the board. That is her job, that is all I know. I have instructed her to make a record of all appearances.

Q. Do you know if that sheet, page 26, is the summary of the personal appearance hearing that went to the appeal board when this defendant took a Selective Service appeal on the grounds that he was a conscientious objector? A. Yes.

Q. Do you know that of your own knowledge?

A. Well, I reviewed these files before they go to the appeal board. The clerk brings the files to me and I review them, you see, and I cannot remember this individual one when I sent it to the appeal board; but the record of the appearance is in there and that is the record before it goes to the appeal board. The record is in there.

Q. That is the usual practice, isn't it?

A. Yes.

Q. And that is what you are really testifying to, isn't it? A. Yes.

Q. Is there any way that you can look at the original Exhibit 1 or the photostat and, by any

(Testimony of Mrs. Mary B. Lewis.)

markings or anything, any typographical error, or in any way testify that you know that particular version of a personal appearance hearing summary was the one that was sent to the appeal board?

A. No, there isn't any way that I could tell that that is the one that was sent to the appeal board.

Q. In the out file, what you have termed the "out file," which I have not yet seen, can you tell me if there is any correspondence or copies of correspondence between your registrant Francy and the hearing officer, the Department of Justice Hearing Officer?

A. No, not in the out file.

Q. Do you know if the clerk of that particular board [14] ever had any copies or the originals of any correspondence between the hearing officer and this defendant, your registrant James Rolland Francy?

A. Well, I am pretty sure she didn't, because I would have seen any correspondence like that that ever came in the office. The mail goes over my desk, and anything like that would be a rather unusual circumstance and I would have noted it. I have never seen any correspondence from any hearing officer after an appeal went to the appeal board.

Q. In this case, or in any case you mean?

A. I would say no, there has never been any.

Q. In any case, or in this case?

A. In this case.

Q. You have seen files that have gone to appeal boards that have come back from the appeal board

(Testimony of Mrs. Mary B. Lewis.)

that have had correspondence between the hearing officer and the registrant, have you not?

Mr. Real: Your Honor, I will object to that question as irrelevant and immaterial to the issues of this case.

The Court: Overruled.

Mr. Real: She has already testified that she saw no letter concerning this case.

The Court: Overruled. You may answer.

A. No, sir.

The Court: You may answer. [15]

A. No, I have never seen any correspondence from any clerk to or from the hearing officer.

Q. (By Mr. Tietz): Not the clerk, the registrant.

The Witness: What was the question, please?

The Court: Correspondence between the registrant and the hearing officer; is that your question?

Mr. Tietz: Yes, sir.

The Court: Have you ever seen any such in any case?

The Witness: Well, not while it was at the appeal board. There may be some in here after it comes back from the appeal board, between the registrant and the hearing officer. There may be. I haven't looked at this file, but that would be known to me—the hearing officer and the registrant, it would be their business transaction and I probably would not pay any attention to it if there was.

Q. (By Mr. Tietz): Your title is "Co-ordinator," is it not? A. Yes.

(Testimony of Mrs. Mary B. Lewis.)

Q. You are in charge as a sort of head clerk of all the boards in that office?

A. In the Burbank group, yes.

Q. There are four or five in that group?

A. Five.

Q. Five.

And this particular board has its own clerk? [16]

A. That is right.

Q. She is a full-time employee, isn't she?

A. Yes.

Q. Does she have an assistant?

A. Not a full-time assistant, no.

Mr. Tietz: That is all.

The Court: Any redirect?

Mr. Real: There will be no redirect, your Honor.

The Court: You may step down. What you have now handed the clerk is a complete file, Exhibit 1?

The Witness: Yes.

The Court: The next witness for the Government.

Mr. Real: With that witness, your Honor, the Government will rest its case.

The Court: The defense.

Mr. Tietz: The defendant would like to make a motion for acquittal on several grounds at this time.

The Court: You may.

Mr. Tietz: The first point that we wish to present is that the file, the Exhibit No. 1, on its face shows an arbitrary classification. I shall go into

that only briefly because your Honor has heard most of my argument on that subject in other cases.

(Argument omitted from transcript upon request of counsel)

Now, my second point, I will invite the court's attention [17] to page 51 of the Exhibit 1. That is the most serious document, perhaps, in a way, that comes to a registrant. It is the only one, I believe, that is ever sent to him in the name of the President of the United States. That is the Selective Service form 252, the Order to Report for Induction.

Now, I will take quite a bit of time on this point, your Honor; first, because it is a good serious point.

The Court: State your position and then I can determine better whether we should take much time with it or not. What is your position?

Mr. Tietz: Not executed.

The Court: You have raised that point in other cases.

Mr. Tietz: I have raised that point in other cases and I will be raising it again because the circumstances are different. I expect to raise it, at least for the record, in two other cases this afternoon that differ from this. Each one differs from the other, by a curious coincidence.

The Court: And your point here is, I suppose, the name "Joseph Fries Member of Local Board" is typed and not signed?

Mr. Tietz: Correct.

The Court: You need to do nothing more than

just state it. I have it under submission here in one case of yours, have I not?

(Argument omitted.)

Mr. Tietz: Now, my next point is that the record showed that after [18] the personal appearance hearing of February 8th, 1951, there was a grave procedural mistake in that there was no reclassification anew. That is why I had in mind Col. Hartwell's concern.

(Argument Omitted.)

Now, I will later, after I put testimony on, show that is not the summary. But taking it as it is, it shows, first, that there was no reclassification, which in itself is a grave mistake.

Then the file shows that after that there was no Form 110 sent, which is a notice, a postcard notice. And while it might be argued that he was not prejudiced, it is my position that there was a jurisdictional mistake and that the Knox and the Stiles cases support that.

Then the next point in connection with the personal appearance hearing and summary itself is that that is not any summary. It is just a minute order. He is entitled to a summary. I might state that was the position that Judge Yankwich took about 10 days ago. It was his very expression: "It is a minute order."

Now, my next point is that the advisory opinion of the hearing officer upon which the Attorney General relied and upon which the appeal board ap-

parently relied—certainly it influenced them—regardless if there is any showing of reliance by the appeal board, it was there, and there are [19] cases that say that anything that is in the file that is improper that could have influenced them, that that is bad.

Pages 44, 45, and 46 are the pages in Exhibit 1 of the advisory opinion of the hearing officer.

And my point in connection with that is, very briefly, this: It is inconsistent with itself. The body of the report says he is a very good boy, altogether a good boy, and then there is a non sequitur in the conclusion, therefore, he should not get what he asks.

Now, that concludes the points that we want to make at this time. I could amplify them, of course, your Honor, argue them, but I think your Honor understands the particular ones that I have raised.

The Court: On the question of sufficiency of the summary of the personal appearance, have you seen the decision of the Court of Appeals in *Dickinson vs. United States*?

Mr. Tietz: Yes, sir.

The Court: Decided March 9th last.

(Argument omitted.)

The Court: The motion for a judgment of acquittal will be denied.

Mr. Tietz: The defendant will take the stand.

Defendant's Case in Chief

JAMES ROLLAND FRANCY

the defendant herein, called as a witness in his own behalf, [20] being first sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: James Rolland Francy.

Direct Examination

By Mr. Tietz:

Q. You are the defendant in this case?

A. I am.

Q. I am going to direct your attention to the personal appearance you had before Local Board No. 85 on February 8th, 1951, and to the summary that is in Exhibit 1 at page 26. You have looked at that summary today? A. Yes, sir.

Q. Did you look at your Local Board file in the office of the Local Board on more than one occasion? A. I have.

Q. When was the first time that you looked at your file that you can recall, approximately, in relation to some other event?

A. The first time, looking at the complete file, was upon the receipt of my order to report for induction.

Q. At that time did you look at what was termed or what appeared to be the summary of the personal appearance hearing? A. I did.

Q. Was it like this page 26 that we now have in Exhibit [21] 1? A. No. It differed.

(Testimony of James Rolland Francy.)

Q. Then you can say that that particular sheet was not the one that you saw after you got your order to report for induction?

The Witness: Would you restate that, please?

Mr. Tietz: May I ask the reporter to read the question?

The Court: Please read it, Mr. Reporter.

(Question read by reporter.)

A. I can.

Q. (By Mr. Tietz): Does page 26 of Government's Exhibit 1 contain material that was not in the original sheet you saw? A. Yes, it does.

The Court: What?

The Witness: In its opening statement, opening statement or statements, it states that I was denied a IV-E classification as well as—let me see.

The Court: Would it be helpful to you to have the clerk place Exhibit 1, page 26, before you?

The Witness: It would.

The Court: Please do so, Mr. Clerk.

The Witness: This "Local Board refused re-classification and informed registrant"—well, that first part was absent in the original copy.

The Court: Which part? [22]

The Witness: "Local Board refused re-classification." No mention was made of any refusal or granting re-classification.

The Court: Anything else?

The Witness: There may have been a rephrasing of the first sentence: "Registrant requested IV-E classification instead of I-AO."

(Testimony of James Rolland Francy.)

The Court: "Instead of I-AO"?

The Witness: No. In my recollection of my appearance, I was not allowed—well, that didn't come out. I mean the appearance was so brief.

The Court: At the time you appeared before the Local Board had you been placed in classification I-AO?

The Witness: I was.

The Court: And what request did you make of the Local Board?

The Witness: At the personal appearance?

The Court: Yes.

The Witness: They didn't get that far.

The Court: Why were you there before them? Did you tell anyone——

The Witness: Well, that was the question that the board member posed, and I said I was there to aid them in the consideration of my claim.

The Court: Did you claim to be in Class IV-E?

The Witness: Yes, sir.

Q. (By Mr. Tietz): Now, what you have just related in answer to the court's query was the sum and substance of what you got to say, or was there more to it, at the personal appearance hearing?

A. I don't believe I understand your question.

Q. When you came to the personal appearance hearing what was the first thing that was said to you?

Mr. Real: Your Honor, I will object to that on the grounds that it is irrelevant and immaterial to the issues of this case.

(Testimony of James Rolland Francy.)

Mr. Tietz: One of the issues, your Honor, is whether that is a correct summary.

The Court: The objection is sustained.

Q. (By Mr. Tietz): Did you at the personal appearance hearing attempt to make some explanations and were cut off?

The Court: Explanations of what?

Q. (By Mr. Tietz): Of your position with respect to your claim as a conscientious objector?

Mr. Real: Your Honor, I will object to that question on the same grounds, irrelevant and immaterial to the issues of this case.

The Court: Sustained.

Q. (By Mr. Tietz): Did you attempt to introduce any evidence at the personal appearance hearing? [24]

Mr. Real: Your Honor, the same objection.

The Court: Sustained.

Q. (By Mr. Tietz): Did you attempt to bring anything before the Local Board that is not reflected by this summary of the personal appearance hearing?

A. No. I intended to, as my correspondence I directed to the board, intended to help them in going over my file and answering any questions that I felt that I could orally support my claim much better. I mean I could aid them in the consideration of my claim much better than any written correspondence.

Mr. Real: Your Honor, I will move to strike all

(Testimony of James Rolland Francy.)

that except the answer "no" as non-responsive to the question.

The Court: It is explanatory of the answer. Motion denied.

Q. (By Mr. Tietz): Did you attempt to discuss your file with the Local Board at that personal appearance hearing?

A. Yes, but I was—the hearing was terminated before any discussion was allowed.

Q. How did you attempt to discuss your file?

A. Well, after the board member posed the question almost identical to the question his Honor asked me, upon my answer that I wished to aid the board in their consideration of my claim, one of the board members interrupted and said, "Well"—oh, a clerk came forward, spoke up and [25] informed me that if I disobeyed any order of the draft board, that I was liable to imprisonment and fine. And I said I had knowledge of that. And then the board member said, "Well, in that case, we are not a high enough board to construe your claim."

Q. Then what occurred?

A. Well, the meeting broke up.

The Court: Did you offer to supply the board with any new information not theretofore included in your file with respect to your claim as a conscientious objector?

The Witness: Well, I felt my presence there—

The Court: No, not what you felt.

The Witness: Well—

The Court: Did you offer to supply any further

(Testimony of James Rolland Francy.)

information, any new data of any kind, new material or new information not theretofore presented to them?

The Witness: No, I did not, other than——

The Court: In other words, your Conscientious Objector form that you filed and the sheets appended thereto fully set forth your claim of conscientious objection?

The Witness: I believe that any such a brief statement is inadequate to support a lifetime of teaching on such a subject. I felt my presence at the board would aid and clarify the points brought up. I don't expect anybody to feel the way I do upon reading my file. I mean that is a matter [26] of years.

The Court: Any further questions of Mr. Francy on direct?

Mr. Tietz: Not with respect to the personal appearance hearing.

Q. But, with respect to the hearing you had before the hearing officer, did you have any correspondence with the hearing officer before the hearing?
A. I did.

Q. Give us the nature of it.

A. I requested adverse information, as a certain mimeographed form I received stated I could.

Q. When did you make such a request?

A. Prior to the hearing.

Q. Did you receive a reply?

A. Yes, I did.

Q. I will hand you a letter signed "Mae Carvell,

(Testimony of James Rolland Francy.)

Hearing Officer, Southern District of California,
on the stationery of the United States Attorney,
dated January 11, 1952. Can you identify that for
us further?

A. Yes, I can. That is the reply to my request
for adverse information.

The Court: Do you offer it in evidence?

Mr. Tietz: We do.

The Court: Received into evidence. [27]

Mr. Tietz: As Defendant's Exhibit A.

The Clerk: Defendant's Exhibit A received into
evidence.

The Court: Please mark it, Mr. Clerk.

Q. (By Mr. Tietz): At the hearing before the
Hearing Officer what occurred with respect to any
disclosure of the FBI report or FBI material?

Mr. Real: Your Honor, I will object to that
question as no proper foundation.

The Court: The question is very broad. I sug-
gest you rephrase it.

Mr. Tietz: I will withdraw it, your Honor.

Q. You did have a hearing before the hearing
officer, Mae Carvell, at some time subsequent to re-
ceipt of this letter dated January 11, 1952?

A. I did.

Q. About when was it, do you recall?

A. January 17th or 18th.

Q. At that hearing did you have a conversation
with Mrs. Carvell? A. I did.

Q. Did she comment that she had an investiga-
tive report of the Federal Bureau of Investigation?

(Testimony of James Rolland Francy.)

A. I missed the first part of that question.

Mr. Tietz: May it be read, your Honor?

(Question read by the reporter.) [28]

A. Well, it was evident she was reading from it.

The Court: Did she say——

The Witness: She quoted from it.

The Court: Did she say she had a report? That is the question.

The Witness: Yes.

Q. (By Mr. Tietz): What did she do with the report?

A. She referred to it and quoted from it.

Q. Did you do anything with respect to the report?

A. Well, I reached for it and asked to see it.

Q. Then what happened?

A. She said, "No. It is for my reference only."

The Court: Did you ask her if she had any adverse information or unfavorable evidence with respect to your conscientious objection claim?

The Witness: Not in those words.

The Court: Well, did you ask her in that sense? You had written her previously asking for it.

The Witness: Yes.

The Court: She wrote back, as shown in Defendant's Exhibit A, and said in effect she would give it to you before the hearing proceeded. When you arrived there for the hearing did you have a conversation with her in pursuance to this correspondence?

The Witness: Well, I asked for the report. [29]

(Testimony of James Rolland Francy.)

The Court: Did you ask her if she had any unfavorable information?

The Witness: I don't recall. I don't believe I did.

Q. (By Mr. Tietz): Did she say anything to you with respect to her conclusion, whether she was recommending your claim be sustained or not?

A. She did.

Q. What did she say?

A. Well, she—it was in answer to my question what would happen from then on, and she said that she would send her recommendation to the Department of Justice, which would be that my claim be sustained.

Mr. Tietz: You may cross-examine.

The Court: Did she say in what classification

The Witness: That my claim—which my claim was for IV-E.

The Court: For IV-E?

The Witness: Isn't that the old I-O?

The Court: And that was the claim you were speaking to her about?

The Witness: Yes.

The Court: Any cross-examination?

Mr. Real: Yes, your Honor. [30]

Cross-Examination

By Mr. Real:

Q. Now, Mr. Francy, you say in answer to your counsel's question that you looked at the complete file after your order to report for induction was mailed to you, is that correct?

(Testimony of James Rolland Francy.)

A. Yes. I examined the contents of this exhibit I have before me.

Q. Is that the first time you ever saw the exhibit?
A. No, it is not.

Q. When is the first time you ever saw the exhibit?

A. Well, I don't recall the first time. One time was at the personal appearance hearing. I didn't examine it fully. That was the first full examination I made of the file.

Q. When did you see it the next time?

A. Shortly after my—shortly after the indictment was brought against me.

Q. Between your personal appearance and the time you were ordered to report for induction you did not see the file?

A. No, I don't believe I did.

Q. So your testimony is that you saw the file only three times, is that correct?

A. Three positive times. The other times—I have [31] been to the board many times. I examined the file fully twice.

Q. You examined it, you say, twice. When was the first time you examined it fully?

A. After the receipt of my order to report for induction.

Q. And at that time you did not see the form that it is in now, is that correct?

A. That is correct.

Q. Now, I want to get one thing straight. I did not quite get your answer when you saw it the first

(Testimony of James Rolland Francy.)

time. Was it before your personal appearance or after it?

A. My file was on the table at the time of the personal appearance. Later on, I suppose about a year and a half later, after my order to report for induction, I examined the file in full at that time and the last time was after the indictment was brought against me.

Q. And subsequent to your personal appearance and to your order to report for induction you never went to the board and asked to see your file, is that correct? A. I was there today again.

Q. I mean from the time of your personal appearance, which was on February 8th of 1951, until you were ordered to report for induction?

A. No, I can't say that for sure.

Q. Then you might have seen the file? [32]

A. I might have.

Q. Between that time? A. Yes.

Q. And did you ever on the occasions that you might have seen the file see this particular page in the file?

A. No, I made no notice of it. I mean I have no recollection.

Q. Do you recall ever seeing any summary as to your personal appearance in the file?

A. My first recollection is at the time I stated after my order to report for induction.

Q. That is the first time that you saw this particular page? A. My first recollection.

Q. Was the page in the same form as it is here?

(Testimony of James Rolland Francy.)

A. Not at that time.

Q. Then you can't state, with any knowledge, that this is not the summary that went to the appeal board, is that correct?

A. No, I should think I could. I think that this form, as I see it here, this page 26, has been changed or is not—in fact, the page itself is larger from between the period of time of my order to report for induction and until the time this indictment was brought against me.

Q. This file went to the appeal board on March 14 of [33] 1951. You were ordered to report on June 20 of 1952? A. Yes.

Q. So you can't say that at the time this file went to the appeal board that this particular summary, that this page was not in the file, is that right?

A. I can say I have examined the file thoroughly twice. My first examination of the file revealed that this is not the form that was in the file at the time.

The Court: By "this" you are referring to page 26?

The Witness: Yes, sir.

The Court: And when did you next examine the file?

The Witness: After the indictment was brought against me.

The Court: Was that page 26, now before you, in the file at that time?

(Testimony of James Rolland Francy.)

The Witness: It was.

The Court: So you do not know what the state of the file was in the interval between those two examinations, is that it?

The Witness: Not between those two; no, sir.

The Court: Put your next question.

Mr. Real: No further questions, your Honor.

Mr. Tietz: No redirect.

The Court: You may step down, Mr. Francy.

Mr. Tietz: The defense would like to have the FBI report. Have we a stipulation on that, Mr. Real? Can we make [34] one, or should we put Mr. Carson on the stand?

Mr. Real: Your Honor, the Government will stipulate that the manila envelope that I have, containing one report dated 5-2-51, is the report that Mr. Carson was ordered to bring to this court pursuant to your Honor's order concerning these FBI reports in these cases.

The Court: Do you stipulate that the envelope contains a full, true and complete copy of the investigative report made by the Federal Bureau of Investigation concerning the conscientious objector claims of this defendant, and that this report—

Mr. Real: I have a complete stipulation to that, yes, your Honor, that I will make as soon as this is marked.

The Court: Do you accept the stipulation thus far stated?

Mr. Tietz: Yes, with one little qualification. I would like to ask one question of the witness.

The Court: Just a moment, now. The report will be marked Exhibit B for identification. Has it been delivered to the clerk under seal?

Mr. Real: It has, your Honor.

The Court: It may remain under seal pending further order of the court.

The Clerk: Your Honor, it is under seal but the seal is broken. [35]

The Court: Reseal it, Mr. Clerk. It is intended to be delivered under seal, I take it?

Mr. Real: It is, your Honor. I did not notice that the seal was broken.

If we may have a stipulation now concerning the report, I think we will have this complete, except for Mr. Tietz's examination of the witness.

The Court: Is there a claim of privilege concerning this report?

Mr. Real: In this particular report, your Honor, there is no claim of privilege.

The Court: There is no necessity of sealing it, then.

Mr. Real: There is none. Our only objection will be, of course, the normal objection of irrelevancy and immateriality.

The Court: Does the Government waive the privilege of executive order 3229 with respect to this report?

Mr. Real: With respect to this particular report we do, your Honor.

The Court: Is there any occasion to question Mr. Carson?

Mr. Tietz: I have not seen it.

The Court: The document will be unsealed and will be treated as any other exhibit in the case, only it has not been offered into evidence as yet. It is marked for identification and you may examine it. Is there any necessity of [36] calling Mr. Carson now?

Mr. Tietz: It will take me just two minutes, with the Court's indulgence, to look at this report, and then I want to ask some questions.

The Court: Will the Government complete its offer of a stipulation?

Mr. Real: Your Honor, may it be stipulated that the Defendant's Exhibit B for identification is a true and accurate copy of the complete investigative report made by the Federal Bureau of Investigation concerning the conscientious objector claims of the defendant, James Rolland Francy?

That Defendant's Exhibit B was forwarded by the representative of the Federal Bureau of Investigation, so designated, for the purpose, to the office of the United States Attorney?

That Defendant's Exhibit B was forwarded by the office of the United States Attorney to the Hearing Officer designated by the Department of Justice to hear the conscientious objector claims of the defendant, James Rolland Francy, as provided in Section 6 (j) of the Universal Military Training and Service Act and Selective Service Regulation 1626.25?

That Defendant's Exhibit B is the investigative report that was in the possession of the Hearing Officer prior to the hearing held to determine the

validity of the conscientious objector claims of the defendant, James Rolland Francy, and [37] was used and referred to by the Hearing Officer in the recommendation she prepared and sent to the Department of Justice concerning conscientious objector claims of the defendant, James Rolland Francy, as provided in Section 6 (j) of the Universal Military Training and Service Act and Selective Service Regulation 1626.25?

The Court: Does the Government offer so to stipulate?

Mr. Real: So offered, your Honor.

The Court: Do you accept the stipulation for the defense?

Mr. Tietz: We would like to see it first, your Honor. May we look it over? We have an intimation that it may or may not include a certain bit of material that came out. If we could have a few minutes?

The Court: You may examine it. We will take the afternoon recess at this time.

(Short recess.)

The Court: In No. 22571, the case at trial, United States v. Francy, is it stipulated the defendant is present?

Mr. Tietz: Yes, sir.

Mr. Real: So stipulated, your Honor.

Your Honor, before we proceed, I would like to make the Government's position clear as to the waiver in this particular case, that is, of the Attorney General's order. The FBI has contacted all of

the people who made statements to the FBI concerning conscientious objector claims of this [38] defendant. They have been contacted and they have consented to allow their names to be disclosed further, that they would be willing to come and testify if they were called. And that is the reason that the Government will waive the privilege of 3229 in this particular case, your Honor.

The Court: I assume there is nothing in the nature of state secrets or anything contained in Exhibit B for identification which would violate the public policy against a disclosure of the confidential informants?

Mr. Real: No. We have contacted those informants and they are willing to have their names disclosed.

The Court: Have you read Defendant's Exhibit B for identification, Mr. Tietz?

Mr. Tietz: Yes, your Honor.

The Court: Do you join in the stipulation proposed prior to recess?

Mr. Tietz: Yes.

The Court: I am glad the Attorney General has thought he could waive the privilege in this case, or in any case, so counsel would have an opportunity to see how thoroughly innocuous these reports can be. Of course, when anything is concealed it heightens interest in the contents of it.

Mr. Tietz: Yes, sir. The very point that we were concerned about.

The Court: I have made it clear throughout, that any [39] time there was anything in one of these

reports that I deemed of any proper evidentiary value to the defense, then the Government will be given the choice of either making the report available or dismissing the case.

Do you wish to offer the report in evidence?

Mr. Tietz: Yes.

The Court: Is there objection?

Mr. Real: Your Honor, as to the offer in evidence we will object on the grounds it is irrelevant and immaterial to the issues of this case.

The Court: What is the purpose of the offer?

Mr. Tietz: The purpose of the offer is to support the argument that we made and that we wish to renew, that the conclusion of the hearing officer and her recommendation was arbitrary and that the evidence is all one way; the evidence all is that he has religious training and religious belief and so on.

The Court: I could not admit it on that ground for that purpose. But if there is any possible contention that there is adverse information in that report which the hearing officer did not disclose as requested, it might be admissible on that ground. It would be relevant to that issue.

Mr. Tietz: There was only one point.

The Court: Do you wish to offer it for that purpose?

Mr. Tietz: Yes, your Honor. [40]

Mr. Real: Your Honor, if he offers it for that purpose, we will object on the ground there is no proper foundation for that offer on that particular point.

The Court: Isn't the foundation here? Wherein is the foundation lacking?

Mr. Real: It is lacking in that this defendant did testify that the hearing officer gave him some information, but not that she denied him any information that was adverse or detrimental to his stand as a conscientious objector.

The Court: Isn't the foundation here that this defendant did request all adverse information?

Mr. Real: That is correct, your Honor.

The Court: And he made a timely request, and hence was under the regulations or under the instructions, which are not in evidence in this case for some reason. You did not see fit to offer them the instructions which were given.

May it be stipulated what the instructions to the registrant here were prior to the hearing?

Mr. Tietz: Yes, it may be stipulated that the—

The Court: Do you have a copy of that form?

Mr. Real: I do not have one in this particular case, your Honor. We were running short of those copies and we have to have some more made, and that is the reason.

The Court: Do you have a copy of any of them so you could offer a stipulation? [41]

Mr. Real: No, your Honor. I think I can offer the stipulation. I know most of the content.

The Court: I have a sample copy that was given me in the Tomlinson case, No. 22461. May it be stipulated that paragraph 2 of the instructions sent to this defendant by the hearing officer prior to the hearing read as follows:

“Upon request therefor by the registrant at any time after receipt by him of the notice of hearing and before the date set for the hearing, the hearing officer will advise the registrant as to the general nature and character of any evidence in his possession which is unfavorable to, and tends to defeat, the claim of the registrant, such request being granted to enable the registrant more fully to prepare to answer and refute at the hearing such unfavorable evidence.”

May it be stipulated that that provision was included in the instructions, written instructions sent by the hearing officer in this case to this defendant as registrant some days prior to the hearing?

Mr. Real: So stipulated, your Honor.

Mr. Tietz: The defendant so stipulates.

The Court: Now, the request was made. The corollary issue in the case may be whether that request was complied with.

Mr. Real: That is correct, your Honor. I think here, now [42] that we have the report before us, we have reached actually the point that we tried to raise before concerning the Morgan case; that unless there is some information in that report, and that this defendant can testify that the hearing officer told him certain information that she thought was derogatory, and she did not include that in her report, that then this investigative report may become relevant. However, without that evidence there is no foundation to show that these

are relevant. I mean if we allow that, then we are going back behind what the administrative officer thought was derogatory.

The Court: The question here is: One, the request was made, was it not?

Mr. Real: That is correct, your Honor.

The Court: Two, the instructions of the Attorney General require that the request be complied with?

Mr. Real: That is correct, your Honor.

The Court: So, as part of the administrative due process as distinguished from constitutional or statutory due process, the question is: Did this defendant receive the derogatory or unfavorable information in response to his request?

The foundation for that would be: One, the request was made; two, was it complied with? That would be the issue, would it not?

Mr. Real: That is correct, your Honor.

The Court: Two would be: What did the hearing officer [43] tell you? Then, measured against what the hearing officer said would be what the hearing officer had in his or her possession, would it not? So the FBI report, once we knew what the hearing officer told the registrant, the unfavorable information, if any, in the possession of the hearing officer would become relevant, would it not?

Mr. Real: I don't think so, your Honor, in this: That we have to look at the function of the FBI report in the hands of the hearing officer, and that function, as distinguished from something else, some other information that is offered by the de-

defendant himself or offered by some outside source other than this investigative report, is part of her thought process. In other words, when she looks at this she thinks certain things are derogatory, because the regulations do not provide that all of it be given to the defendant.

The Court: Isn't it a portion of her thought process to guard against arbitrary action based upon concealed or undisclosed information? For instance, suppose a case where the hearing officer said the registrant wrote a request pursuant to this administrative process; the registrant said, "I want to know the unfavorable evidence against me." The hearing officer says, "There is none, there is none, so there is nothing for me to give you." And the hearing officer sends in an unfavorable recommendation, does not mention any unfavorable information, but we open the FBI report and we [44] see all manner of unfavorable information.

Wouldn't that FBI report be admissible to show—I mean as relevant to the issue, as to whether the administrative process here was arbitrary?

The Attorney General has said if the registrant makes a timely request, he is entitled to have information as to unfavorable information; he is entitled to be informed as to unfavorable information in the possession of the hearing officer and an opportunity to refute it. The registrant makes the request and in effect it is denied. Of course, if you have a denial, then a denial of the request, out of hand, that is one problem. But here there was no denial. In the case I supposed there was no denial;

there was a purported compliance. On the issue of whether or not there was compliance would not the information, in fact, in possession of the hearing officer be relevant?

Mr. Real: I would like to make some sort of distinction in that, your Honor, because I do not think it is properly admissible to a jury. In other words, as a question of evidence to a jury it would not be admissible on that point. I think it would be this: Under the Cox case it might be admissible for the determination of your Honor as to whether or not the action of the hearing officer was arbitrary and capricious in view of the information that is placed in the report. [45]

The Court: The hearing officer does not take action, that is, any definitive action.

Mr. Real: I realize that, your Honor.

The Court: The hearing officer does not make any classification. The hearing officer merely makes a recommendation. In my view, if the Attorney General did not chose to do so, he would not be required to submit the report of the Federal Bureau of Investigation to the hearing officer, or the hearing officer would not be required to disclose to the registrant unfavorable information received by the Department of Justice as a result of the inquiry which the statute directs the Department of Justice to make. But the Attorney General has seen fit to combine, in effect, the inquiry, or to connect the inquiry and the hearing and has set up the administrative machinery for informing the registrant.

Mr. Real: I think, by the same token, your

Honor, we have the situation that if Congress had so deemed it, it would not be necessary for them to set up an appeal in any of these cases, and the only action or the only stop-gap on an appeal on the arbitrariness and capriciousness of an appeal board is your Honor's decision that their action is not arbitrary and capricious—a review by a court and not by a jury.

The Court: But an appeal board decides things. A hearing officer does not decide anything. He just makes a recommendation to an official in the Department of Justice who, in turn, [46] makes a recommendation to the appeal board.

Mr. Real: If your Honor goes along that line, then there can be no denial of due process by arbitrary and capricious action of the hearing officer.

The Court: Except of such due process as the Attorney General himself has conceived and provided here.

Mr. Real: That is right, your Honor.

The Court: What I called "administrative process."

Mr. Real: We have that one department that is analogous, extremely analogous to the Cox case and the appeal board. In other words, as to the arbitrary and capricious action, I think, your Honor—

The Court: Is there any testimony here as to what the hearing officer told this registrant in the way of unfavorable information?

Mr. Real: I do not think there is, your Honor.

The Court: Well, the foundation is not laid.

Mr. Tietz: I want to put the defendant back on for two questions.

The Court: Is there anything unfavorable, in your view, in this FBI report?

Mr. Tietz: No, but there is one misstatement of fact that might have been used.

The Court: I will sustain the objection at this time to the offer of Exhibit B for identification into evidence. [47]

Would you like to recall the defendant?

Mr. Tietz: Yes, the defendant would like to take the stand again.

The Court: He may.

JAMES ROLLAND FRANCY

recalled.

Direct Examination

(Resumed)

By Mr. Tietz:

Q. Mr. Francy, you have looked at the FBI investigative report and I am going to place it before you again and ask you to look at page 4 of it that gives the information furnished by a Mr. Bishop. Does it contain any incorrect statement of fact? A. Yes, it——

Mr. Real: Your Honor, I will object to that question as irrelevant and immaterial.

The Court: Sustained.

Mr. Tietz: Your Honor, it is my thought that if any information before the hearing officer was incorrect, and if this witness will testify, as I believe the witness is prepared to testify, that that

(Testimony of James Rolland Francy.)

incorrect statement of fact was not disclosed to the registrant when he was at the hearing, he then did not have the opportunity to set the hearing officer straight on what might have been the determining bit of evidence.

The Court: Is it unfavorable in character? [48]

Mr. Tietz: Yes.

The Court: Intended to be?

Mr. Tietz: Well, I will give the nature of it in three words, three or four words. He was requested to resign and that, it seems to me, is something which is unfavorable when said to anyone.

The Court: When you went to the hearing, Mr. Francy, did the hearing officer give you any information which she stated she had in her possession and which she considered unfavorable to or which tended to defeat your claim as a conscientious objector?

The Witness: Not in those terms. She quoted from the report.

The Court: What portion? Did she quote from the report what she said she considered unfavorable evidence, or just quoted generally?

The Witness: Just quoted generally.

The Court: Have you examined Exhibit B for identification?

The Witness: I believe that is this report?

The Court: Yes.

The Witness: I have.

The Court: I will reverse my ruling on that. We have to get at it some way. I do not know any better

(Testimony of James Rolland Francy.)

way to get at it than you are proceeding there, Mr. Tietz, and that is to ask him—if your purpose is to show that there was some [49] unfavorable evidence in the hands of the hearing officer which was not supplied this defendant pursuant to his request, I will allow the question.

The Witness: Yes, sir.

The Court: Do you find something in Exhibit E which you consider unfavorable which was not disclosed to you by the hearing officer?

The Witness: In my opinion it is, rather, I believe to be incorrect, and it was not disclosed.

Mr. Real: Your Honor, I move to strike——

The Court: Do you consider it unfavorable?

The Witness: Yes, it would tend to influence.

The Court: Pardon me?

Mr. Real: Your Honor, I will move to strike the former answer: “I think it is——”

The Court: “incorrect”?

Mr. Real: ——“incorrect.”

The Witness: All right. It is incorrect.

Mr. Real: Well, even that, your Honor, on the ground the question of the correctness or incorrectness of this report is not in issue in this case. It is whether or not this evidence, as placed in the FBI report, was given to him by the hearing officer.

The Court: There would be two ways of getting at it. One it to ask this witness when he made a request for unfavorable [50] information.

Mr. Real: That is correct, your Honor.

(Testimony of James Rolland Francy.)

The Court: Two is to ask him everything told him by the hearing officer.

Mr. Real: That is correct.

The Court: And against that you measure what she has in her possession, don't you?

Mr. Real: Yes, sir.

The Court: I was just attempting to short cut and I think Mr. Tietz was, too.

Mr. Real: I am sorry, your Honor.

The Court: Instead of asking everything she told him, we have the benefit here now of the short cut through the disclosure of the FBI report; so we turn it around the other way and ask him if he looked through it and does he see anything there which he considers unfavorable and which she did not disclose to him.

Mr. Real: Yes, your Honor. But my objection is to the answer that this report here is untrue. I don't think that is in issue here.

The Court: No, it is not in issue. The objection will be sustained as to that answer and that answer will be stricken.

Mr. Francy, do you find anything in Exhibit B for identification which you consider to be unfavorable to you [51] and which was not disclosed to you by the hearing officer?

The Witness: I do.

The Court: Will you read what portion of Exhibit B for identification you so find?

The Witness: Under the caption "Clarence E. Bishop" it states: "He stated that the registrant

(Testimony of James Rolland Francy.)

had been asked to resign because on two or three occasions he had failed to follow orders concerning the manner in which his work should be handled.”

The Court: Is that all of it which you consider unfavorable?

The Witness: Well, he goes on and explains his—yes, I would say that.

Q. (By Mr. Tietz): Was that disclosed to you by the hearing officer at the hearing?

A. No, it was not.

Q. Now I am going to ask you to look at Exhibit 1, page 12.

The Court: Do you wish to renew your offer at this time of Exhibit B for identification into evidence?

Mr. Tietz: Yes, sir. I think that would be the orderly way to get that.

The Court: Is there objection?

Mr. Real: No objection at this time, your Honor.

The Court: Exhibit B for identification received into [52] evidence.

The Clerk: Defendant's Exhibit B received into evidence.

Mr. Tietz: Will the clerk please place before the witness Exhibit 1 of the Government?

Q. Would the witness please turn to page 12 of Exhibit 1? Is that the minutes of actions of the Local Board? A. Yes, it is.

Q. Would you please look at the line that has been on the left “2-8-51”? There are two entries at

(Testimony of James Rolland Francy.)

different dates on that one line, that one space, rather. A. Yes.

Q. Did you at these two or more occasions when you went to the board to look over your file notice that something was not there at one time and was added at another time? A. I did.

Q. What was it?

A. The statement "Refused a IV-E classification."

Q. Why did you notice that or why do you remember it?

A. Well, my first glance at it made me believe that I had at no time refused to accept a IV-E classification, which I don't believe they meant it that way.

Mr. Tietz: You may cross examine.

Cross-Examination

By Mr. Real:

Q. You say your first impression was that you say you [53] thought they meant that you had refused a IV-E classification?

A. Well, that is what drew my notice.

Q. That is what drew your notice to it. That is the first time you looked at the file that drew notice to this one particular line?

A. No. That is the particular statement which drew my notice at my second complete examination of the file.

Q. Did you observe the line the first time you looked at the file?

(Testimony of James Rolland Francy.)

A. I did. I examined the minutes of actions very carefully.

Q. You can say at this time that you are positive that statement was not there at that time, is that correct?

A. That I have quoted, yes.

Q. You are positive that that was not there?

A. I can, yes.

Q. The first time that you looked at the file, and you can say that you are positive that page 26 was not in the form that it is now?

A. I can.

Q. At that time?

A. I can.

Q. At your personal appearing on February the 8th of 1951, were you refused a IV-E classification?

A. The matter was not delved into. [54]

Q. They did not consider the IV-E classification?

A. No.

Q. What was your personal appearance for?

A. That is what I thought it was for, but the board asked me why I was there. I said I was there to aid them in considering my claim. And they informed me that I was liable to prosecution if I didn't follow an order of the board. I said I was aware of that. And then, as I stated before, the member of the board said, "Well, in that case we are not a high enough board to consider your file."

Q. Did you tell them at that time that you wanted a IV-E classification?

A. Well, it was evident from my letter requesting an appeal of my claim of I-AO.

The Court: You do not know what action the

(Testimony of James Rolland Francy.)

board may have taken following your personal appearance, I take it?

The Witness: They said that I would receive an order to report for physical examination, is the only action.

Q. (By Mr. Real): Mr. Francy, I call your attention to page 27.

A. Yes.

Q. The second paragraph says: "This is to confirm the decision of your board that your complete file will be forwarded to the Appeal Board after you have taken the physical examination for the Armed Forces and found Acceptable for [55] service."

A. Yes.

Q. You received that subsequent to your personal appearance hearing? A. I did.

Q. Can you tell us from your own knowledge what the board meant when they said: "This it to confirm the decision of your board that your complete file will be forwarded to the Appeal Board"?

A. The contents of this folder we have here.

Q. The "decision"—I am referring to the word "decision."

A. Well, the "decision" seems to refer that they decided it is the complete file.

Q. Now, was there any talk of any "decision" at your personal appearance?

A. No, there was not, other than what I have stated.

The Court: The only "decision", as I understand it, that was given to you at the time of the

(Testimony of James Rolland Francy.)

hearing or following your personal appearance there before the Local Board was that that board could not do anything for you, in substance, or would send the matter up to the appeal board for review, is that it?

The Witness: Well, they didn't say where they would send it. They just stated they were not a high enough court to consider my file. [56]

The Court: Then following the personal appearance you received the letter of February 8th, which is set forth on page 27 of Exhibit 1, the Selective Service file?

The Witness: I did.

The Court: Anything further?

Mr. Real: Yes, one more question.

Q. Calling your attention to page 26, you testified that that was not the page that you saw when you looked at your file after you were ordered to report for induction? A. Yes.

Q. Did you see any page that referred to your personal appearance at that time? A. I did.

Q. What did that page say in substance?

A. In substance it was quite similar to page 26 as it is here, with the exception that it was a bit more brief and the sheet was about half the size of the page 26 as it appears before me here.

Q. It was "quite similar." What do you mean by "quite similar"? What information did it have on it?

Official Reporter.

The Court: Let us not spend any more time on

(Testimony of James Rolland Francy.)

that unless you have some new point. You have been over it once, haven't you?

Hasn't that question been asked and you answered it before, Mr. Francy? [57]

The Witness: Yes.

Mr. Real: No further questions, your Honor.

The Court: Anything further?

Mr. Tietz: No redirect.

The Court: You may step down.

Mr. Tietz: And the defendant rests.

The Court: Any rebuttal?

Mr. Real: One moment, your Honor. I would like to call Major Keeley to the stand, please.

Plaintiff's Case in Rebuttal

ELIAS M. KEELEY

called as a witness by the plaintiff in rebuttal, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Elias M. Keeley, K-e-e-l-e-y.

Direct Examination

By Mr. Real:

Q. Major Keeley, what is your occupation?

A. I am a Major in the United States Army, assigned to the Selective Service and have charge of the classification and all administrative matters of Selective Service in Southern California.

Q. And as part of your duties is it your duty to review the files of registrants of Selective Service Boards within your jurisdiction? [58]

(Testimony of Elias M. Keeley.)

A. It is.

Q. I call your attention to Government's Exhibit 1 in evidence and ask you whether you reviewed that file?

A. I have reviewed all except this new one packet which I have not seen.

Mr. Tietz: Excuse me. I will object to the materiality of the line of questioning; whether the Major reviewed it or anyone else would have no bearing.

The Court: What is the purpose of it?

Mr. Real: Your Honor, I am going to show by this witness that when he reviewed the file prior to it going to the appeal board or at the appeal board that a page similar in size to this page 26 and containing the information contained on page 26 was in the file at that time.

Mr. Tietz: I will withdraw my objection.

Q. (By Mr. Real): Major Keeley, when did you make the review of that file?

A. About the middle of March, 1951.

Q. And that was a date prior to, or subsequent to the file going to the appeal board?

A. That was while the file was at the appeal board, before it was considered by the appeal board members.

Q. I call your attention specifically to page 26 of the file for the defendant and ask you if you have seen that page before? [59]

A. Well, I have seen a very similar page.

(Testimony of Elias M. Keeley.)

can't say that this is the identical page, no.

Q. Would you say that the page that you saw, that you say is similar, was the same size as that page? A. I believe it was; yes, sir.

Q. I will ask you to read that page and ask you if it contained that information?

A. Yes, this information was on a page, a piece of paper similar to this.

Q. And that page was subsequent to your review sent to the appeal board?

A. It was considered by the appeal board, forwarded to the U. S. Attorney and to the hearing officer, back to Washington, and when it came back from Washington, we again checked the file and it was in there when it returned from Washington. We keep track of every piece of paper before we send it to the U. S. Attorney for fear something might be lost.

Mr. Real: You may cross examine.

Cross-Examination

By Mr. Tietz:

Q. Major, do you have any way of identifying each sheet of paper by marking or otherwise before it goes to the appeal board? A. I do not. [60]

Q. Any way of identifying it after it comes back from the appeal board?

A. No, except that we have our list of what was there and we generally can remember these various cases, but no particular marks on it.

Q. When you say "remember" do you mean you

(Testimony of Elias M. Keeley.)

go by memory on how many sheets or what was in the file? A. No, we write those down.

Q. Do you paginate the sheets as any time before or after it goes to the appeal board?

A. In some cases some local boards do that, but we do not require it. We do, however, when it is sent for photostating.

Q. So that these small pencil numbers with the circle around that appear on this file and similar files are put on ordinarily when it is photostated?

A. That is correct.

Q. At state headquarters?

A. That is correct.

Q. Do you have any means of knowing whether or not this precise page 26 was the sheet purporting to be summary of this defendant's personal appearance that was in the file when it went to the appeal board?

A. I cannot say that this was the identical sheet, no, sir. [61]

Q. If another sheet had been made and had added a line or two or rephrased something in addition to adding a line, would you be able to remember that? A. Ordinarily I would not.

Q. Is there anything about this particular case or this particular sheet that will enable you to say whether or not this precise sheet was in the file when it went for the consideration of the appeal board?

A. Yes, because in this particular case I reviewed it extra special because the summary was

(Testimony of Elias M. Keeley.)

such a short summary, and when I inquired as to why it was such a short summary they said that is all that happened.

Q. Was that first line that says "Registrant requested IV-E classification instead of I-AO"—was that in the version that went to the appeal board?

A. I believe it was. I cannot say positively.

Q. Was the next line that says "Local Board refused reclassification," that phrase of the next line, was that in there?

A. Yes, that was there. I remember that.

Q. Are you familiar with what is called the out file in this case? A. No, I am not.

Q. Well, if I were to inform you that in November, November 12, 1952, Col. Hartwell commented on the fact that [62] the summary did not show and the file did not show that there had been a reclassification, reconsideration, would that help refresh your memory of the circumstances?

A. I remember it because I reported it, was when he happened to write that letter instead of myself.

Q. And that was in November of 1952, was it not?

A. That was the 5th time that I had reviewed this file just prior to forwarding it to Sacramento for being photostated.

Q. What is Col. Hartwell's position in the Selective Service setup?

A. Well, he is administrative officer, you might say. We have two separate branches down there. We

(Testimony of Elias M. Keeley.)

have the southern area headquarters, of which he is in charge, and we have the district headquarters, of which I am in charge. Our duties are entirely separate but they conflict. He is the deputy, assistant deputy director of Selective Service and, as director co-ordinator, I am assistant to the director, if you can figure that out.

Mr. Tietz: Thank you.

The Court: Anything further?

Mr. Real: Nothing further, your Honor.

The Court: You may step down, Major Keeley. Any further rebuttal?

Mr. Real: No further rebuttal, your Honor. [63]

The Court: Does the Government rest?

Mr. Real: The Government rests.

The Court: Does the defendant rest?

Mr. Tietz: The defendant rests, your Honor.

The Court: Does the defendant now renew his motion for judgment of acquittal?

Mr. Tietz: Yes, sir. The defendant renews all the points that were raised then, and I would like to add some others that have been developed by the defense testimony.

The first point we would like to raise now is that there is a fairly clear indication that this defendant was not reprocessed at the personal appearance hearing, in that there is more evidence before the court now than there was at the close of the Government's case. The crowding of two lines on the line of February 8, 1951, and the defendant's testimony, that that particular part was un rebutted that there

was an addition of that line, namely, "Refused a IV-E classification, along with the testimony that was in before of the summary and of the letter of Col. Hartwell, would go to indicate that they did not do as they should have done, reclassified him.

Then there is the additional point that at the personal appearance hearing he was given no opportunity to go into the discussion of the file.

Now, that is an additional point to what is the usual [64] point, that the registrant wanted to bring up new and further testimony or evidence.

(Argument omitted from transcript upon request of counsel.)

But now, there is still another point in connection with the personal appearance hearing, and that is, they must do their function. They seem to be under the impression that they are mere transmitters of the files to appeal boards. They disregard what is really a judicial function. It was up to them at his personal appearance in which he requested—now, of course, he, like many of these young fellows, threw them off in his letter. His letter says: I want a personal appearance hearing and appeal, and it ignored to some extent the personal appearance part and they considered he was really going to get an appeal. But their duty is to first go over the matter of this personal appearance to give him all the opportunity, within reasonable limits of time, to present his case, and then they can turn thumbs down. But they must consider it, and they did not

consider it, and that is what I say is the most important denial of due process.

Now, I wish to advance, although I am not prepared to argue it in any particular length, that when the hearing officer said he could not have the FBI report, that he was then deprived of a right which has not yet been recognized by the courts although it has been touched on, as the court commented [65] on Judge Wallace's opinion in the Bouziden case, a District Court case.

And that, of course, brings us to the next point. When at a hearing a witness is lulled into security, when he is given to understand that everything is all right—I will recommend that your claim be sustained—and then turns around in her actual report and says he has all the requirements, he is a good boy, he has religious training, belief, and all that, but I do not recommend that he have anything but a I-AO, that should not be sustained.

That was the first line in her "conclusion." That when she does that, she has not given him a fair hearing that she should have. This is somewhat of a new point.

(Argument omitted.)

Now, the next point is this: That the hearing officer used an illegal basis in her determination. That is a point that I will have to put a number of things together on to lay the foundation for my argument.

The only thing, going over the report that she made as to her factual findings, that could support

her claim would be the statement that he is not as active now in his religious work as he was before.

Well, I have argued that point, that he should have had a chance to explain that, if it was her position, as I think it was. [66]

But the point I want to make now is that that is an illegal basis.

(Argument omitted.)

The Court: There is not any question in my mind throughout this defendant's entire encounter with the Selective Service System, as disclosed by his file, that he was found at all stages and by all persons whom he encountered entirely honest. The net result of the finding is this as I see it: Yes, he has the conscientious objections which he is expected to have, but those beyond the conscientious objections which entitle him to I-AO category of classification are not based on religious training and belief, are not founded. The burden is upon him and he has not sustained the burden, therefore, he is classified I-AO.

I find no irregularities in the administrative procedure. For that reason the defendant must be found guilty as charged. It is so ordered.

I will continue the case until March 30th, at 10:00 o'clock in the morning for sentence.

Is there anything to be gained by ordering a presentence report of this defendant?

Mr. Tietz: I have my doubt. I can say for certain in this case that they could not find anything

that would help the court, that the FBI did not find.

The Court: What is the view of the government?

Mr. Real: I do not think it will be necessary, your Honor.

The Court: Very well, the court will direct that no presentence investigation or report be made in this case. The case is continued until March 30th, at 10:00 o'clock for sentence and all further proceedings.

Is the defendant at liberty on bail?

Mr. Real: Yes, he is, your Honor.

The Court: The court will continue your bail pending sentence, Mr. Franey. You are instructed to return to this courtroom on March 30th next at 10:00 o'clock in the morning. Do you understand the date?

The Defendant: Thank you.

Mr. Real: Your Honor, if it please the court, may the Government at this time withdraw Government's Exhibit 1 to return to the clerk of the Local Board?

The Court: The original file is Government's Exhibit 1 in evidence and there is also——

Mr. Real: I do not think we have put the photostatic copy in evidence, your Honor.

The Court: There is also a photostatic copy which I have here which has been marked in evidence.

Mr. Tietz: We have no objection to the substitution, provided that the Government furnish the out file.

Mr. Real: A photostatic copy of the out file. We will do that, [68] your Honor.

The Court: The photostatic copies are furnished to conform the photostatic of Exhibit 1 to the original file which is Exhibit 1. Is it stipulated that upon that condition, that condition having been fulfilled, that the original file may be withdrawn and that the photostatic copy shall stand as Exhibit 1, the file, in evidence?

Mr. Tietz: We so stipulate.

The Court: So ordered.

Mr. Real: May we withdraw it to photostat that copy, your Honor?

The Court: Do you have the clerk photostat it or have you facilities?

Mr. Real: Yes, we will have them. And, for the record, we can stipulate that the out file is seven pages, if that will help.

The Court: The stipulation, Mr. Real, is that you shall conform a photostatic copy to the original which is in evidence, and when that has been done to the satisfaction of the clerk, the clerk will deliver you the original file and detain the photostatic copy of the file as Exhibit 1.

Is that your understanding, Mr. Tietz?

Mr. Tietz: Yes, or if Mr. Real may have carbon copies he wants to substitute, that will be all right.

The Court: I suggest as long as substantially all the [69] file has been photostated, that you be consistent and complete it in the photostatic form and deliver it to the clerk in that form so it may be retained as a complete photostatic copy of the Selective Service file.

Mr. Real: Your Honor, we cannot photostat without this particular part of the file which I am holding, which is the file referred to as the out file.

The Court: I understand. Did you not say the clerk was to do the photostating for you?

Mr. Real: The clerk here. We have been having the Selective Service System do our photostating, your Honor, in these cases.

The Court: Is there any objection to the withdrawal of the out file, so-called out file, from the original file, Exhibit 1, for that purpose?

Mr. Tietz: The defendant has no objection.

The Court: Very well, it is so ordered pursuant to stipulation. [70]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings, as specified by counsel for defendant, had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 9th day of July, 1953.

/s/ ALBERT H. BARGION,

[Endorsed]: Filed July 16, 1953.

[Endorsed]: No. 13940. United States Court of Appeals for the Ninth Circuit. James Rolland Francy, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed July 29, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 13940

JAMES ROLLAND FRANCY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENTS OF POINTS ON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

I.

Classification of appellant in Class I-AO (making appellant liable for noncombatant military service) was arbitrary and without basis in fact.

II.

Appellant was denied due process of law in connection with his personal appearance hearing before the local board, on each of the following grounds:

First: appellant was deprived of the kind of personal appearance hearing contemplated and guaranteed by the regulations in that the board did not shoulder its responsibility to reclassify but deliberately shifted it to the appeal board and in that it did not give him the opportunity to discuss his file and his classification, as guaranteed by the regulations.

Second: the summary of the personal appearance hearing was not a true summary, as contemplated and as required by the regulations but was a mere Minute Order, and the evidence and testimony establishing that the summary of the personal appearance hearing may have been altered to conceal a violation of Sec. 1624.2(d) S.S. Regulations discloses sufficient irregularity to vitiate the entire proceedings.

Third: the regulations in effect at the time appellant had his personal appearance hearing before the local board mandatorily required that he be classified anew after said hearing and this was not done.

III.

The Hearing Officer deprived appellant of due process of law in the following particulars each vitiating the usefulness of his report and tainting the further classification action:

First: although appellant made a timely request to see the FBI investigation report she refused to show it to him.

Second: her report was arbitrary and prejudicial

in that it's adverse conclusion was inconsistent with its own findings of fact.

Third: she used an illegal basis for her adverse conclusion.

IV.

The regulations mandatorily required that appellant be sent a notice of the action taken by the local board as a result of his personal appearance hearing.

V.

The plaintiff did not show, beyond a reasonable doubt, that the Order to Report for Induction was validly executed.

VI.

The failure and refusal to provide appellant with the secret FBI report was a violation of the Act, the Regulations, and the due process clause of the Fifth Amendment.

/s/ J. B. TIETZ,

Attorney for Appellant.

[Endorsed]: Filed September 9, 1953.

[Title of Court of Appeals and Cause.]

ADOPTION OF DESIGNATION

Appellant hereby adopts the Designation of Record heretofore filed in the District Court.

/s/ J. B. TIETZ.

[Endorsed]: Filed September 9, 1953.

